

ESTTA Tracking number: **ESTTA678585**

Filing date: **06/17/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91209825
Party	Plaintiff Kiss My Face, LLC
Correspondence Address	CARRIE A JOHNSON FRASER CLEMENS MARTIN & MILLER LLC 28366 KENSINGTON LANE PERRYSBURG, OH 43551 UNITED STATES firm@fraser-ip.com, johnson@fraser-ip.com, boes@fraser-ip.com
Submission	Other Motions/Papers
Filer's Name	Carrie A. Johnson
Filer's e-mail	firm@fraser-ip.com, johnson@fraser-ip.com, holub@fraser-ip.com
Signature	/caj/
Date	06/17/2015
Attachments	42343-1-Reply Brief - Public Version - Redacted-06172015.pdf(751997 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

KISS MY FACE, LLC,

Opposer,

v.

PYR LESS GROUP, LLC,

Applicant.

)
)
)
)
)
)
)
)

Opposition No. 91209825

OPPOSER'S REPLY BRIEF

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	2
I. INTRODUCTION	4
II. REPLY ARGUMENT	4
A. “KISS” is not the dominant element in the mark KISS MY FACE.	5
B. The meaning of the words “kiss” and “touch” reinforces a likelihood of confusion.	10
C. The actual price of the parties’ products is not a factor that serves to differentiate the parties’ goods.	12
D. There is no evidence that purchasers of TOUCH MY FACE and KISS MY FACE goods are anything other than average purchasers exercising ordinary care.....	13
E. The fact that there has been no actual confusion is of no consequence.....	13
III. CONCLUSION	15

TABLE OF AUTHORITIES

Cases

<i>American Home Prods. Corp. v. Johnson Chemical Co.</i> , 589 F.2d 103 (2nd Cir. 1978).....	12
<i>AMF Inc. v. American Leisure Products, Inc.</i> , 474 F.2d 1403 (C.C.P.A. 1973).....	10
<i>Burger Chef Sys., Inc. v. Sandwich Chef, Inc.</i> , 608 F.2d 875, 878, 181 USPQ 168, 169 (C.C.P.A. 1979).....	8, 12
<i>Canadian Imperial Bank of Commerce v. Wells Fargo Bank, N.A.</i> , 1 U.S.P.Q.2d 1813 (Fed. Cir. 1987).....	12
<i>Florence Mfg. Co. v. J. C. Dowd & Co.</i> , 178 F. 73 (2d Cir. 1910)	12
<i>Giant Food, Inc. v. Nation's Foodservice, Inc.</i> , 710 F. 2d 1565 (Fed. Cir. 1983)	8
<i>In re Bercut-Vandervoort & Co.</i> , 229 USPQ2d 763 (T.T.A.B. 1986).....	13
<i>In re Majestic Distilling Co., Inc.</i> , 315 F.3d 1311,1317 (Fed. Cir. 2003) (<i>citing, J.C. Hall Co. v. Hallmark Cards, Inc.</i> , 340 F.2d 960,964 (C.C.P.A. 1965)).....	14
<i>In re Opus One, Inc.</i> , 60 U.S.P.Q.2d 1813, 1817 (T.T.A.B. 2001)	12
<i>In re USG Corporation</i> , 2010 WL 985341 at *6 (T.T.A.B. 2010).....	14
<i>Industria Espanola de Perlas Imitacion, S.A. v. National Silver Co.</i> , 459 F.2d 1049, 59 C.C.P.A. 1058 (C.C.P.A. 1972).....	7
<i>J & J Snack Foods Corp. v. McDonalds Corp.</i> , 932 F.2d 1460, 18 U.S.P.Q.2d 1889, 1892 (Fed. Cir. 1991)	13
<i>Keebler Co. v. Murray Bakery Prods.</i> , 866 F.2d 1386, 1390, 9 USPQ2d 1736, 1739 (Fed. Cir. 1989).....	8, 9
<i>Masterpiece of Pennsylvania, Inc. v. Consolidated Novelty Co.</i> , 368 F.Supp. 550 (S.D.N.Y.1973)	12
<i>Nina Ricci S.A.R.L. v. E.F.T. Enterprises, Inc.</i> , 889 F.2d 1070, 1074, 12 U.S.P.Q.2d 1901, 1904 (Fed. Cir. 1989).....	4
<i>Pacquin-Lester Co. v. Charmaceuticals, Inc.</i> , 484 F.2d 1384, 179 USPQ 45 (C.C.P.A. 1973)	9
<i>Productos Lacteos S.A. de C.V. v. Paleteria La Michoacana Inc.</i> , 98 U.S. P.Q.2d 1921 (T.T.A.B. 2011).....	10
<i>Schwarzkopf v. John H. Breck, Inc.</i> , 340 F.2d 978, 52 C.C.P.A. 957 (C.C.P.A. 1965)	7
<i>Stouffer Corp. v. Health Valley Natural Foods, Inc.</i> , 1 U.S.P.Q.2d 1900, 1902, 1986 WL 83342 (T.T.A.B.1987), <i>aff'd</i> , 831 F.2d 306, 1987 WL 44470 (Fed.Cir.1987)	8

<i>Sure-Fit Products v Saltzon Drapery Co.</i> , 254 F.2d 158 (C.C.P.A. 1958).....	9
--	---

MEMORANDUM

I. INTRODUCTION

Opposer, Kiss My Face, LLC (“Opposer”) respectfully submits the following Reply Brief in Support of its Trial Brief against Applicant, PYR Less Group, LLC (“Applicant”). The record evidence overwhelmingly shows that Opposer has established strong and protectable rights in its KISS MY FACE mark long prior to Applicant’s first use of the mark TOUCH MY FACE and that there is a likelihood of confusion between Opposer’s KISS MY FACE and Applicant’s TOUCH MY FACE marks.

Applicant’s Trial Brief does not rebut the likely confusion between Applicant’s TOUCH MY FACE mark and Opposer’s KISS MY FACE marks based upon the combined weight of several key *DuPont* factors, including the strength of the KISS MY FACE mark based upon successful, long-standing use and promotion of Opposer’s KISS MY FACE branded goods, Applicant’s use of the TOUCH MY FACE mark on identical products sold to identical consumers without any restrictions on the trade channels. With all doubts resolved in favor of Opposer as the senior user, the Board should deny registration of Applicant’s proposed TOUCH MY FACE mark. *See Nina Ricci S.A.R.L. v. E.F.T. Enterprises, Inc.*, 889 F.2d 1070, 1074, 12 U.S.P.Q.2d 1901, 1904 (Fed. Cir. 1989).

II. REPLY ARGUMENT

There is a likelihood of confusion between Applicant’s TOUCH MY FACE mark and Opposer’s KISS MY FACE mark. Opposer’s attempt to cast doubt on the strength and fame of Opposer’s KISS MY FACE mark fails. Opposer introduced unrefuted evidence establishing that it has marketed and distributed KISS MY FACE personal care products in the U.S. widely and continuously since at least 1981, with over [REDACTED] dollars of KISS MY FACE branded

products sold in the U.S. for the past five years alone. (Dkt. 23, Fufidio Dep. 11:20-13:3 and Dkt. 24 Ex. 2.)

It has also been established that U.S. consumers are exposed to Opposer's KISS MY FACE goods nationally in well-known retail outlets, including Whole Foods, Kroger, Walgreen's, Target and others. (Dkt. 23, Fufidio Dep. 9:10-23.)

Opposer also established that it drives awareness of its KISS MY FACE brand through a variety of media including national ad campaigns and prominent features of KISS MY FACE goods in famous and widely circulated magazines. (Dkt. 29 and 30, Opposer's Trial Brief, pp. 10-14.) Importantly, Opposer's undisputed consumer survey showed that its marketing efforts have clearly been effective, with fifty-seven percent of participating consumers indicating an awareness of KISS MY FACE brand in the natural products channel. (Dkt. 23, Fufidio Dep. 16:21-17:13, and Dkt. 24, Ex. 3 at p. 52-53.)

A. "KISS" is not the dominant element in the mark KISS MY FACE.

Applicant also argues at length that the term "kiss" is the dominant element in the mark KISS MY FACE. Opposer does not agree. On the contrary, assuming *arguendo* that any portion of the mark KISS MY FACE is dominant, it is likely that consumers would consider both words KISS and FACE dominant, especially considering the design marks¹ used by Opposer:



(U.S. Registration No. 4,450,641)



(U.S. Registration No. 4,450,641)

¹ Given that Applicant has applied to register its mark as a standard character word mark, there is nothing to prevent Applicant from formatting its mark vertically, with TOUCH on top, MY in the middle, and FACE on the bottom.

Applicant asserts that the KISS MY FACE brand is built around the word “kiss”. The fact that some of Opposer’s advertisements use the word “kiss” or “kissers” does not mean that Opposer “systematically” gears its marketing towards “kiss” and/or depictions of people kissing. (Dkt. 31, p. 24). On the contrary, Opposer’s Chief Marketing Officer testified that Opposer’s products – all of them, including products that are not intended for use on the face, lips, or mouth – are branded with the entire mark KISS MY FACE. Further, there is no company policy that kissing or even lips, be shown in KISS MY FACE advertisements. (Dkt. 23 Fufidio Dep. 85:22-86:10; 86:25-87:12.)

Despite arguing that “kiss” is dominant in Opposer’s mark, Applicant also asserts that the word “kiss” in KISS MY FACE mark is weak based upon alleged third party uses of marks that include the word “kiss” or “kisses” in connection with “personal cosmetic goods”. (Dkt. 31, p. 19.) Specifically, Applicant argues that “the shared and commonly used term “kiss” would be a weak basis for asserting a likelihood of confusion.” (Dkt. 31, p. 34.) This argument is misplaced because this case is not about the shared term “kiss”.

Applicant also asserts that the phrase “my face” is weak because it is “descriptive of the parties’ goods, and at least highly suggestive of both parties’ goods.” (Dkt. 31, p. 28.) The closest Applicant comes to supporting this assertion is an allegation that the word “face” has been disclaimed in “*at least three*” of Opposer’s federal trademark registrations². (Dkt. 31, p. 19.) In reality, *two* of Opposer’s ten registrations for the mark KISS MY FACE include disclaimers of the word “face”.

Again, Opposer’s KISS MY FACE mark is the subject of eight federal registrations (Dkt.

² One of the three registrations referenced by Applicant, U.S. Reg. No. 3,005,002, is not even for the mark KISS MY FACE, but is for the mark FACE FACTOR. (Dkt. 31, p. 28, 29.)

18) for personal care products and the related retail store services, which have *no disclaimer* of “face”. Those registrations are:

1. U.S. Registration No. 4,450,642 KISS MY FACE and Design
2. U.S. Registration No. 4,450,641 KISS MY FACE and Design
3. U.S. Registration No. 4,229,593 KISS MY FACE
4. U.S. Registration No. 4,200,053 KISS MY FACE SHIMMER
5. U.S. Registration No. 3,120,784 KISS MY FACE WHITENING
6. U.S. Registration No. 3,590,613 KISS MY FACE MOISTURE SOAP
7. U.S. Registration No. 2,301,324 KISS MY FACE
8. U.S. Registration No. 1,991,868 KISS MY FACE

Thus, on separate eight occasions the U.S. Patent and Trademark Office (“the PTO”) has *not* found the word “face” descriptive of Opposer’s personal care products. Further the PTO has never required Opposer to disclaim the entire phrase “my face” in any federal registrations for the mark KISS MY FACE for personal care products.

The fact that on two occasions the PTO has required a disclaimer of the word “face” from Opposer’s U.S. Registration Nos. 1,513,297 and 4,268,625 for the marks KISS MY FACE is not dispositive of whether or not there is a likelihood of confusion here. It is well settled that disclaimed material still forms a part of the mark and cannot be ignored in determining a likelihood of confusion. *Industria Espanola de Perlas Imitacion, S.A. v. National Silver Co.*, 459 F.2d 1049, 59 C.C.P.A. 1058 (C.C.P.A. 1972); *Schwarzkopf v. John H. Breck, Inc.*, 340 F.2d 978, 52 C.C.P.A. 957 (C.C.P.A. 1965).

Moreover, disclaimers are not helpful in preventing likelihood of confusion in the mind of the consumer, because he is unaware of their existence. Therefore, the disclaimed portions of the mark must be considered in determining the likelihood of confusion.” *Giant Food, Inc. v.*

Nation's Foodservice, Inc., 710 F. 2d 1565 (Fed. Cir. 1983) (considering the word "GIANT" in the parties' mark despite applicant's disclaimer of that word).

Likewise, Applicant was not required to disclaim the word "face" or the phrase "my face" in the Application, demonstrating yet again that the word "face" and the phrase "my face" are not *per se* descriptive of personal care products at issue here.

The cases cited by Applicant in support of its contention that there is no likelihood of confusion based upon the shared term "face" are inapplicable. Here, Applicant has sought to register its mark as a standard character word mark, with no stylization or design elements. In its discussion of the case *Burger Chef Sys., Inc. v. Sandwich Chef, Inc* (Dkt. 31, p. 27), Applicant failed to mention important facts considered by the Court in affirming the Board's conclusion that there was no likelihood of confusion, including that the *Burger Chef* case involved *design marks*, which had "distinctly different chef caricature" design elements. *Burger Chef Sys., Inc. v. Sandwich Chef, Inc.*, 608 F.2d 875, 878, 181 USPQ 168, 169 (C.C.P.A. 1979).

Another distinguishable case discussed by Applicant is *Stouffer Corp. v. Health Valley Natural Foods, Inc.*, 1 U.S.P.Q.2d 1900, 1902, 1986 WL 83342 (T.T.A.B.1987), *aff'd*, 831 F.2d 306, 1987 WL 44470 (Fed.Cir.1987). (Dkt. 31, p. 27.) *Stouffer* involved diet-conscious purchasers of prepared entrees, determined by the Board to be a special class of purchasers who may be expected, at least, to carefully examine the front of the packages in order to determine what kind of entree is contained therein and its caloric content. As discussed in sections C and D below, there is no evidence that the consumers of KISS MY FACE and TOUCH MY FACE products are anything other than average consumers exercising ordinary care.

Applicant also relies upon *Keebler Co. v. Murray Bakery Prods.*, 866 F.2d 1386, 1390, 9 USPQ2d 1736, 1739 (Fed. Cir. 1989), which involved the marks PECAN SHORTEES and PECAN SANDIES, both for cookies. In that case, it was clear that the shared term PECAN, was

“at least, merely descriptive of a principal ingredient of both parties’ cookies”.³ *Id.* Applicant Murray Bakery even had two prior registrations for PECAN marks on cookies, which corroborated the Board’s view that the descriptive term PECAN could not serve to indicate the source of pecan-based cookies. *Id.* By comparison, here the overwhelming evidence establishes that the shared element in the parties marks – “my face” – is not descriptive: Despite numerous federal registrations for the KISS MY FACE mark, the PTO has never required Opposer to disclaim “my face”, on eight separate occasions the PTO has *not* found the word “face” descriptive of Opposer’s personal care products, and the opposed application for TOUCH MY FACE includes no disclaimers whatsoever.

It is also noteworthy that in *Keebler Co. v. Murray Bakery Prods.*, Opposer Keebler “submitted nothing in respect of consumer perception...in relation to the descriptiveness of PECAN when used on pecan cookies. *Id.* Here, Opposer has offered into evidence a survey showing significant brand awareness within the natural personal care products channel – with fifty-seven percent of participating consumers indicating an awareness of KISS MY FACE brand. (Dkt. 23, Fufidio Dep. 16:21-17:13, and Dkt. 24, Ex. 3 at p. 52-53.)

Finally, Applicant has cited a registration owned by a third party for a mark that includes the words “my face” and two registrations owned by another party for marks that include the term “myface”. These three registrations are for make-up cosmetics products. (Dkt. 31, p. 34.)

³ Similarly, in two other cases cited by Applicant, it was clear that the marks or components of the marks at issue were inherently weak. In *Pacquin-Lester Co. v. Charmaceuticals, Inc.*, 484 F.2d 1384, 179 USPQ 45 (C.C.P.A. 1973) (SILK ‘N SATIN for beauty lotion for hands and skin versus SILK for face cream), the opposer admitted that “silk” is commonly used in marks used on lotions intended to make the skin feel silky and there was evidence of a number of third party registrations for SILK marks used on such goods. In *Sure-Fit Products v Saltzon Drapery Co.*, 254 F.2d 158 (C.C.P.A. 1958), the Court indicated “In reaching our decision we have been most strongly influenced by the fact that the marks in issue, “Sure-Fit” and “Rite-Fit” are the weakest possible type of mark.” The mark KISS MY FACE is far more distinctive than the inherently weak trademarks at issue in these cases.

Applicant has offered no evidence whatsoever of the commercial scale of the products allegedly offered by these two parties under the registered marks, or whether the products allegedly offered under these marks compete with Opposer's all natural soap, lotion, shampoo, sunscreen, etc., products. There is no evidence in the record to confirm whether the products allegedly offered under the cited marks are actually in use. As such, these three registrations have little, *if any*, probative value in the likelihood of confusion analysis. *See AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 1404 (C.C.P.A. 1973) ("The existence of [third party] registrations is not evidence of what happens in the market place or that customers are familiar with them nor should the existence on the register of confusingly similar marks aid an applicant to register another likely to cause confusion, mistake or to deceive."); *Productos Lacteos S.A. de C.V. v. Paleteria La Michoacana Inc.*, 98 U.S. P.Q.2d 1921 (T.T.A.B. 2011) ("Absent evidence of actual use, third-party registrations have little probative value because they are not evidence that the marks are in use on a commercial scale or that the public has become familiar with them.").

B. The meaning of the words “kiss” and “touch” reinforces a likelihood of confusion.

Applicant also alleges that there is no likelihood of confusion because consumers will perceive the different meanings of the words “touch” and “kiss”, which will avoid confusion in spite of the shared element “my face”. (Dkt. 31, p. 25.)

This allegation ignores the plain similarities between the meaning of the words “touch” and “kiss”. “Kiss” is defined as touching something with the lips, but it is also defined more generally as “to touch gently or lightly <wind gently kissing the trees>” and “a gentle touch or contact”. (Dkt. 19, Opposer's NOR, Ex. 1.) Similarly, most of the definitions for “touch”

indicate that “touch” is a bodily contact, often with an affectionate purpose:

touch, verb

: to put your hand, fingers, etc., on someone or something”

: to be in contact with (something)

touch, transitive verb

1: to bring a bodily part into contact with especially so as to perceive through the tactile sense: handle or feel gently usually with the intent to understand or appreciate <loved to touch the soft silk>.

Based upon these definitions, the words “touch” and “kiss” convey the same or highly similar imagery to consumers. In many contexts, consumers might even use the words “touch” and “kiss” interchangeably.

The similarity in meaning of the words “kiss” and “touch” is also apparent from the testimony of Opposer and Applicant with respect to the overall impression conveyed by their respective brands:

Opposer’s Chief Marketing Officer Testimony:	Applicant’s President/Chief Executive Officer’s Testimony:
KISS MY FACE is “all about the emotional connection that women have with their significant other, or men have with their significant other, when they use the brand. It’s that emotional connection with the brand and how it makes your skin feel.” (Dkt. 23. Fufidio Dep. 30:13-24; 32:7-33:3.) KISS MY FACE stands for kissably soft, touchable soft skin. (Dkt. 23. Fufidio Dep. 35:20-22.)	TOUCH MY FACE mark was selected as a “result of the feedback ...from clients and from personal experience with the product...It would make women want to use those words (TOUCH MY FACE) to their husbands.” (Dkt. 19, Opposer’s NOR, Ex. 6, June 30, 2014 Mitchell Dep. 4:9-20.)

Given the similarities between the meaning of the words “kiss” and “touch”, it is not surprising that Opposer and Applicant convey the same message to consumers- KISS MY FACE

and TOUCH MY FACE products are so effective others will want to feel (i.e., touch with the hands, lips, etc.) the user's skin.

Case law is replete with illustrations where similarity of meaning was held sufficient to warrant a finding of confusion. *E.g., American Home Prods. Corp. v. Johnson Chemical Co.*, 589 F.2d 103 (2nd Cir. 1978)(ROACH INN found to infringe ROACH MOTEL, both for roach traps); *Burger Chef Sys. Inc. v. Burger Man, Inc.*, 492 F.2d 1398, 1399, 181 USPQ 168 (C.C.P.A. 1974) (BURGER MAN found to infringe BURGER CHEF, both for restaurant services); *Florence Mfg. Co. v. J. C. Dowd & Co.*, 178 F. 73 (2d Cir. 1910)(STA-KLEEN found to infringe KEEPCLEAN, both on toothbrushes); *Masterpiece of Pennsylvania, Inc. v. Consolidated Novelty Co.*, 368 F.Supp. 550 (S.D.N.Y.1973)(ALPINE KING found to infringe MOUNTAIN KING, both for artificial Christmas trees). As in the aforementioned cases, considering the identity of the parties' goods and the similar meaning of the words "touch" and "kiss", consumers could easily believe that TOUCH MY FACE products are an extension of Opposer's popular KISS MY FACE line of products, or that TOUCH MY FACE personal care products are somehow affiliated with Opposer.

C. The actual price of the parties' products is not a factor that serves to differentiate the parties' goods.

Applicant's argument that the parties offer "more expensive, high-end products" (Dkt. 31, p. 16) is irrelevant, given that no price restriction appears in either Opposer's or Applicant's respective identification of goods. *See Canadian Imperial Bank of Commerce v. Wells Fargo Bank, N.A.*, 1 U.S.P.Q.2d 1813 (Fed. Cir. 1987); *In re Opus One, Inc.*, 60 U.S.P.Q.2d 1813, 1817 (T.T.A.B. 2001)(No price restriction appears in either party's description of goods and services, therefore "applicant's evidence concerning the expensive nature of applicant's restaurant

services and of registrant's wine, as well as the Trademark Examining Attorney's concession that applicant's and registrant's respective goods and services are expensive, are legally irrelevant and cannot be considered in our likelihood of confusion analysis."); *See In re Bercut-Vandervoort & Co.*, 229 USPQ2d 763 (T.T.A.B. 1986)(Rejecting the applicant's arguments regarding the high cost and quality of its wine and the sophistication of its purchasers, where application identified goods merely as "wine").

D. There is no evidence that purchasers of TOUCH MY FACE and KISS MY FACE goods are anything other than average purchasers exercising ordinary care.

Despite evidence that the parties' personal care products are moderately priced, sold without a prescription at retail, Applicant argues that the target consumers are sophisticated. (Dkt. 31, p. 35-38.) Regardless, this argument is irrelevant because no restrictions appear in either Opposer's or Applicant's respective identification of goods with respect to the goods being expensive or anything other than an average purchase of personal care products like moisturizer, soap, shampoo, sunscreen, and face masks. *See In re Bercut-Vandervoort & Co.*, 229 USPQ2d 763 (T.T.A.B. 1986)(When both parties sell wine, confusion is measured by purchasers of "not only expensive wines sold to careful, discriminating wine connoisseurs through fine wine and spirits stores but also less expensive wine sold to ordinary consumers through liquor stores, grocery stores, supermarkets, drug stores and the like").

E. The fact that there has been no actual confusion is of no consequence.

The parties are not aware of any incidents of actual confusion. However, the absence of actual confusion does not mean there is no likelihood of confusion. *J & J Snack Foods Corp. v. McDonalds Corp.*, 932 F.2d 1460, 18 U.S.P.Q.2d 1889, 1892 (Fed. Cir. 1991). "A showing of

actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight...” *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311,1317 (Fed. Cir. 2003) (citing, *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960,964 (C.C.P.A. 1965)).

“The absence of any instances of actual confusion is a meaningful factor only where the record indicates that, for a significant period of time, **an applicant’s sales and advertising activities have been so appreciable and continuous** that, if confusion were likely to happen, any actual incidents thereof would be expected to have occurred and would have come to the attention of one or both of these trademark owners.” *In re USG Corporation*, 2010 WL 985341 at *6 (T.T.A.B. 2010) (**emphasis added**).

Despite the alleged period of coexistence since 2002, testimony from Applicant’s CEO and employee have proven that TOUCH MY FACE sales and advertising activities have been scant. Applicant’s annual expenditures for advertising of TOUCH MY FACE goods from 2008 to 2013 were approximately \$100 per year. (Dkt. 19, Opposer’s NOR, Ex. 8, Interrogatory Resp. No. 24.) The only product offered under the mark TOUCH MY FACE by Applicant from 2002-2011 was a facial mask.⁴ (Dkt. 19, Opposer’s NOR, Ex. 6, Mitchell Dep. 13:20-14:4.) Applicant’s employee estimated that 2002 to 2012, **less than 50 units of TOUCH MY FACE facial masks were sold per year.**⁵ (Dkt. 19, Opposer’s NOR, Ex. 7, Bytheway Dep. 14:3:10; 16:25-17:8.) Those products were sold in the “Amarillo, Texas, and perhaps Lubbock, Texas”

⁴ Applicant did not offer a skin serum until 2012 (Dkt. 19, Opposer’s NOR, Ex. 7, Bytheway Dep. 13:23-24) and despite Opposer’s objection, TOUCH MY FACE soap was offered in approximately 2013. (Dkt. 19, Opposer’s NOR, Ex. 6, Mitchell Dep. 5:2-6; Dkt. 25, Applicant’s NOR, Ex. 5, p. PYR000104-105.)

⁵ Applicant produced sales records for a number of products; however, Applicant did not isolate what amount of the sales were attributed to sale of TOUCH MY FACE products.

(Dkt. 19, Opposer's NOR, Ex. 8, Interrogatory Resp. No. 7) and to a single doctor in California (Dkt. 19, Opposer's NOR, Ex. 7, Bytheway Dep. 7:24-8:5).

Despite the fact that Opposer and Applicant offer identical all-natural personal care products, given Applicant's extremely limited promotion and sales of TOUCH MY FACE goods, it is not surprising that Opposer did not learn of Applicant until it applied for federal registration of the mark TOUCH MY FACE. Likewise, an absence of actual confusion is not surprising and has little, if any, bearing on a likelihood of confusion in this case.

III. CONCLUSION

For the reasons stated herein and in Opposer's Trial Brief, Opposer respectfully urges the Board to sustain this Opposition proceeding and to refuse registration of Applicant's Application Serial No. 85/663,155.

Respectfully submitted,

Dated: June 17, 2015

/s/ Carrie A. Johnson

Carrie A. Johnson

FRASER CLEMENS MARTIN & MILLER LLC

28366 Kensington Lane

Perrysburg, Ohio 43551

Email: johnson@fraser-ip.com, firm@fraser-ip.com

Attorney for Opposer

CERTIFICATE OF SERVICE

I certify that on June 17, 2015, the foregoing Opposer's Reply Brief was served on counsel for the Applicant via U.S. Mail addressed as follows:

Burdett, Morgan, Williamson & Boykin, LLP
Attention: Christian D. Stewart, Esq.
3423 Soncy Road, Suite 300
Amarillo, Texas 79119

/s/ Carrie A. Johnson
Carrie A. Johnson
FRASER CLEMENS MARTIN & MILLER LLC
28366 Kensington Lane
Perrysburg, Ohio 43551
Attorney for the Opposer